MOHAMED NAZRAN MOHAMED HANIFA

v.

AL-EKHWAN CONSTRUCTION PTE. LTD.

HIGH COURT, SINGAPORE
LP THEAN J
[ORIGINATING SUMMONS NO. 24 OF 1990]
30 APRIL 1991

CONTRACT: *Contractor - Agreement to obtain necessary approvals - Effect of failure to obtain approval within 3 months - Option to terminate the agreement - Notice of termination - Waiver - Planning Act (Cap 232) [Sing], s. 9(1).*

CONTRACT: *Equitable - Criteria - Unequivocal representation - Enforcement of strict legal right.*

The plaintiff P had entered into an agreement with the defendants D for the restoration of P's property in return for which some of these properties were to be transferred by P to D. The agreement also required D to obtain the necessary planning approvals and to carry out the works at their own cost. D were also required to pay P certain sums of money when P's properties were transferred to D or their nominees. Clause 2.3 of the agreement stated that if D failed to obtain the necessary approvals within 3 months of the agreement, P had the option to terminate the agreement.

P served a notice of termination on D which D disputed and on 9 January 1990, P sought a declaration that the agreement had been validly terminated on 9 December 1989.

The two issues were:

(i) whether D had failed to obtain the requisite consents or approvals from the relevant competent authorities to carry out the restoration and to obtain the building approval within period of three months as provided in Clause 2.3 of the agreement or at the time of the service of the notice of termination, and

(ii) whether P had by reason of certain acts on his part represented to D that he had waived his rights under Clause 2.3 of the agreement and whether there were representations made by P on which D had relied on and acted in good faith.

Held:

[1] The requisite approvals contemplated in the agreement were not obtained within the 3 months of execution of the agreement and therefore was not obtained by D at the date when the notice terminating the agreement was served; D therefore had, as of that date, failed to comply with Clause 2.2 of the agreement.

[2] D had not shown any evidence that they had acted on or have been influenced by any representation made by P since P had not unequivocally represented to D that he would not enforce his strict legal right under Clause 2.3.

[3] Merely referring and relying on the documents alone is not sufficient to discharge the burden placed on D; waiver requires knowledge, and unless P was aware on the material dates that D had not obtained the requisite consent or approval, he could not be said to have waived his right under Clause 2.3.

[Plaintiff's claim allowed.]

Case referred to:
Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatorina [1983] 1 QB 529 ***(cons)***

Legislation referred to:
Planning Act (Cap 232) [Sing], s. 9(1)

For the plaintiff - V. Ramakrishnan (assisted by Sathi Anusiah Devi)
For the defendants - S. Balasubramaniam

JUDGMENT

LP Thean J:

The plaintiff is the owner of the land and premises marked on a government resurvey map as Lot 51-2 of Town Subdivision 13, Singapore together with buildings thereon known as nos. 25, 27, 29, 31 and 33, Haji Lane. The land and premises are situate in the Kampong Glam Conservation Area. The defendants are building contractors. On 1 March 1989, the plaintiff and the defendants entered into an agreement in writing (the agreement) whereby, amongst other things, the defendants agreed to restore and upgrade, at their own costs and expenses, the five units of the said premises, namely, 25, 27, 29, 31 and 33, Haji Lane (the premises) in accordance with the plans, elevations and specifications approved by the plaintiff and the relevant competent authorities, and the plaintiff agreed to transfer to the defendants three units of the premises, namely, no. 25, 27 and 29, Haji Lane.

For the purpose of these proceedings, the material provisions of the agreement are mainly those in Clause 2. Clause 2.1 thereof provides that it is a condition precedent of the agreement that the defendants should proceed forthwith at their own costs and expenses to apply for and obtain all necessary or requisite consents or approvals from the relevant competent authorities for the restoration of the premises, including but not limited to the following:

(a) planning permission in respect of the restoration of the land; and

(b) approvals from the appropriate authorities for the restoration and upgrading of the premises.

Clause 2.2 provides that it is a condition precedent of the agreement that the defendants should pay to the plaintiff (a) a deposit of $5,000 which is refundable to the defendants upon termination of the agreement under Clause 2.3 and 23 thereof and (b) a non-refundable sum of $45,000 "upon the completion of the restoration and execution of the necessary documents to convey absolutely" the plaintiff's interests in nos. 25, 27 and 29, Haji Lane to the defendants or their nominee. Clauses 2.3 and 2.4 provide as follows:

> 2.3 In the event that the developer fails to obtain the requisite approvals from the relevant authorities to carry out the restoration and to obtain the Building Approval within a period of three (3) months from the date hereof or the owner fails to receive the monies listed in Art. 2.2(a), the owner shall have the option to terminate this agreement summarily by notice in writing and shall forthwith repay the deposit of the sum of Dollars Five Thousand (S$5,000) (to) the developer and thereupon this agreement shall be rescinded and become null (sic) and void and of no further effect whatsoever. All costs and expenses incurred by the developer in respect of the application for approvals, payment of the restoration charge, architect's, legal fees and other expenses related to this restoration shall be borne by the developer. Neither party shall have any claims or demands against the other for damages costs or otherwise whatsoever in the matter.
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> 2.4 It is a condition precedent of this agreement that the owner shall at the request of the developer execute all documents in relation to any financial arrangement entered into by the developer and any financial institutions including but not limited to the loan mortgage supplemental agreements with respect to the developer's units and such costs and expenses in relation hereto shall be borne solely by the developer.

After the agreement was executed, it appears that the defendants' architects, Architectmatrix, made submissions to the Urban Redevelopment Authority (URA). On 2 June 1989 URA wrote to the architects as follows:

Dear Sir,

Proposed development to existing 2 storey shophouse on Lot 31-2 TS 13 at 25 to 31 Haji Lane

1. Please refer to your letter dated 23 May 1989.
2. The subject building is located within Kampong Glam Conservation Area.
3. We have no objection to the proposal subject to the compliance of the following:

3.1 Drawings

Detailed drawings showing the architectural elements and material used should be submitted to URA for comments. This is to ensure that you have complied with the conservation guidelines before submission for Building Plan Approval.

Yours faithfully

- sgd -

Tan Teck Min

for Dy Chief Planner (Planning)

There were subsequent correspondence between the architects and URA, and on 20 September 1989 the architects received the following letter from URA:

Dear Sir,

Proposed development to existing 2 storey shophouse on Lots 31-2 Ts 13 To 31 Haji Lane

1. Please refer to your letter dated 8 August 1989.
2. The subject building is located within Kampong Glam Conservation area.
3. We have no objection to the proposal subject to the compliance of the following:

3.1 **House No.**

The plan and letter stated that the shophouses involved are 25 to 31 (odd numbers). We also note that the location plan shows that house no. 32 is included. However the plan title is for shophouses nos. 25-31. Please clarify whether house no. 32 or 33 are to be part of your submission.

3.2 **Soffit of covered walkway**

The soffit of the covered walkway should be exposed timber of the 2nd storey floor structure. This should be stated in the Section S-S.

3.3 **Section S-S**

The position of S-S drawn does not correspond with that of the plans that is, the Section S-S cuts through the vent for new W.C. whereas the plans does not indicate so.

3.4 **Front Elevation**

There should be a timber transoms above the proposed timber framed demountable timber boardings at the 1st storey.

On 8 December 1989, the plaintiff through his solicitors served on the defendants a notice of termination of the agreement pursuant to Clause 2.3, and the material part of the notice is as follows:

> We are instructed by our client that you have to-date not obtained the requisite approvals including Building Approval from the competent authorities. Under Clause 2.3 of the said agreement, our client has the option to terminate the said agreement summarily by notice if the said approvals are not obtained within 3 months of the date of the said agreement.
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> We are instructed by our client to and do hereby give you notice pursuant to Clause 2(3) of the said agreement that our client is hereby exercising his option and terminating the said agreement henceforth. The said agreement is now null and void and of no effect. We also enclose herewith our client's cheque for $5,000.00 in your favour being refund of the deposit paid by you.

The termination was disputed by the defendants and they returned the cheque of $5,000 to the plaintiff's solicitors.

On 9 January 1990, the plaintiff initiated proceedings against the defendants by way of an originating summons seeking a declaration that the agreement had been validly terminated on or about 9 December 1989. The originating summons was subsequently amended to include other consequential reliefs. The summons came on for hearing before me, and at the conclusion of the hearing I allowed the claim of the plaintiff, granted the declaration asked for and also made certain consequential orders in relation to an indenture of mortgage executed by the plaintiff and awarded costs of the proceedings to him. I now give my reasons.

At the commencement of the hearing, I enquired from both Counsel for the plaintiff and the defendants whether there would be any oral evidence to be adduced before me. Both Counsel confirmed that there would be no oral evidence. Counsel for the defendants, however, made a preliminary submission that there were disputes of facts and, in particular, the plaintiff raised the issue of *non est factum* and made allegations of fraud, collusion and undue influence. Counsel submitted that these proceedings should be continued as if the cause or matter had been commenced by a writ of summons with the result that the cause or matter would be heard and tried in open Court with witnesses giving *viva voce* evidence. Counsel for the plaintiff in response submitted that his client had not made any allegation of *non est factum* and was not relying on the plea of *non est factum* or any alleged fraud, collusion or undue influence. He would be relying wholly on the documents and submitted that the hearing should proceed. Counsel for the defendants, then agreed that on that basis the hearing should proceed. Accordingly, I heard the summons wholly on the documents before me, namely, the affidavits and the exhibits produced, and there was no application made by either party for leave to cross-examine any deponent on any of the affidavits.

There were only two issues before me: (i) whether the defendants had failed to obtain the requisite consents or approvals from the relevant competent authorities to carry out the restoration and to obtain the building approval within the period of three months as provided in Clause 2.3 of the agreement or at the time of the service of the notice of termination, and (ii) whether the plaintiff had by reason of certain acts on his part represented to the defendants that he had waived his rights under Clause 2.3 of the agreement and if there were representations made by the plaintiff whether the defendants had acted in good faith and relied on such representations.

The first issue turns on what approval, if any, the defendants had obtained from the relevant competent authorities to carry out the restoration works, and what building approval, if any, they had obtained from the Building Control Division of the Public Works Department within the period of three months from the date of the agreement as provided in Clause 2.3. The agreement was executed on 1 March 1989 and on the documents before me the defendants had not, as of 1 June 1989, obtained any form of consent or approval from any authority.

Applying the provision strictly, the defendants had not obtained any consents or approvals from the relevant competent authorities within the three months as stipulated in Clause 2.3. Only on 6 June 1989 did the defendants' architects receive the letter of 2 June 1989 from URA stating that the authorities had "no objection to the proposal" subject to compliance with certain requirements relating to the drawings. The letter of 20 September 1989 from URA repeated that the authority had no objection to the proposal subject to compliance with certain conditions. The defendants relied on the first letter or alternatively the second letter as "in-principle" approval. In my opinion, on a plain reading of the two letters, neither of them amounts to an approval from URA; they did not even say that approval in principle had been granted. The deputy chief planner, the writer of these letters, in his letter of 4 September 1990 said that these two letters were no more than comments on "conservation aspects to architects who (submitted) pre-submission consultations on their proposals". He subsequently confirmed in his letter dated 14 September 1990 that no "in-principle approval" by the competent authority had been given by the two letters. It is clear to me that in the circumstances of this case the requisite consents or approvals contemplated in Clause 2.2 are (i) the written permission for the proposed restoration of the premises under s. 9(1) of the Planning Act (Cap. 232) issued by the competent authority, and (ii) building plan approval from the Building Control Division of the Public Works Department. Neither of these were obtained by the defendants at the date when the notice terminating the agreement was served, and the defendants therefore had, as of that date, failed to comply with Clause 2.2 of the agreement.

On the second issue, the defendants relied on the following acts of the plaintiff, namely:

(a) the plaintiff on 12 June 1989 signed an application form to the Tenants' Compensation Board;

(b) the plaintiff on 5 July 1989 forwarded a letter from the Inland Revenue Department to the defendants requesting the latter to respond to the queries raised in connection with the premises, and

(c) the plaintiff on 5 October 1989 executed an indenture of the mortgage (subsequently dated 24 October 1989) of the premises to United Overseas Finance Ltd. to secure a loan of $690,000 to be granted by the finance company to the defendants to finance the costs and expenses of the restoration works to be carried out by the defendants.

It was contended on behalf of the defendants that by these acts the plaintiff represented that he had waived his rights under Clause 2.3 of the agreement and the defendants had acted in good faith and relied on such representations of the plaintiff and that it would be inequitable to allow the plaintiff to insist on his strict legal right under Clause 2 and terminate the agreement (see paras. 9 and 10 of the affidavit of Abdul Rahman bin Abdul Kadir affirmed on 25 January 1990 and filed on behalf of the defendants). The defendants thus invoked the principle of equitable estoppel, and to succeed on this plea the defendants would have to satisfy two criteria which are as follows: (i) there has been an unequivocal representation by the plaintiff that he would not insist on his strict legal right under Clause 2.3 of the agreement, and (ii) the defendants have so relied on or have been so influenced by such representation that it would be inequitable to allow the plaintiff to enforce his strict legal right: *Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatorina* [1983] 1 QB 529. That was a shipping case in which the charterers were sometimes late in their payment of their hire, varying from one to three days over a period of two years. Subsequently, on one occasion, when the charterers had failed to pay on time the hire instalment due, the owners withdrew the vessel.

The owners instituted proceedings against the charterers seeking an order declaring that they were entitled to withdraw the vessel from the charterers' service. It was contended by the charterers, *inter alia*, that the owners having received late payments in the past without protest were estopped from exercising their right of withdrawal without prior notice of intention to do so. This argument was rejected by the High Court which held that there had been no unequivocal representation by the owners that they would not insist on punctual payment of the hire by the charterers. On appeal, the Court of Appeal upheld the decision of the High Court. The judgment of the Court was delivered by Robert Goff LJ and in disposing of the argument of equitable estoppel, he said, at pp. 534-535:

> There was also no dispute that, in order to bring themselves within that principle (of equitable estoppel), the charterers had to establish that two criteria had been fulfilled. First, they had to establish that the owners had represented unequivocally that they would not enforce their strict legal right, under the contract between the parties, to withdraw the vessel from the charterers' service in the event of a default in payment of an instalment of hire: see *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd.* [1972] AC 741. Second, they had to establish that in the circumstances it would be inequitable to allow the owners to enforce their strict legal right, having regard to the dealings which had taken place between the parties: see *Hughes v. Metropolitan Railway Co.* [1877] 2 App Cas 439, 448, per Lord Cairns LC. The first requirement may however be fulfilled if a reasonable man in the shoes of the charterers would have inferred from the owners' conduct that they were making such a representation: see *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-lzegem PV..B.A.* [1978] 2 Lloyd's Rep 109, 126, per Lord Salmon. As to the second requirement, since equitable estoppel is founded upon a representation, it can only be unconscionable for the representor (here the owners) to enforce his strict legal right if the conduct of the representee (here the charterers) has been so influenced by the representation as to call for the intervention of equity. Whether or not the representee's conduct has been so influenced must depend upon the evidence; but the Court is entitled to infer from the evidence that his conduct has been so influenced.

Turning to the facts in this case, I find it impossible to say that purely on the basis of the documents alone, that is, the application form to the Tenants' Compensation Board, the income tax query form and the indenture of mortgage, the plaintiff had unequivocally represented to the defendants that he would not enforce his strict legal right under Clause 2.3. True it is that, as at these dates, the period of three months under that clause had expired. But there was no evidence as to the circumstances in which the application form was signed, the income tax query form was delivered to the defendants and the indenture of mortgage was executed. In particular, the defendants have not shown that on any of these dates the plaintiff was informed by the defendants or in some other way was made fully aware that the requisite consent or approval under Clause 2.3 had not been obtained. Nor have they shown what discussions, if any, took place in relation to such consent or approval. Merely referring to and relying on the documents alone is not, in my opinion, sufficient to discharge the burden placed on them. On the material before me, it seems to me probable that the plaintiff on these various dates did not really appreciate that the defendants had not obtained the requisite consents or approvals from the relevant competent authorities. Waiver requires knowledge, and unless the plaintiff was aware on these dates that the defendants had not obtained the requisite consent or approval, he could not be said to have waived his right under Clause 2.3 or to have unequivocally represented to the defendants that he would not insist on his strict legal right.

Further, in respect of the indenture of mortgage which the plaintiff was called upon to execute in early October 1989, it seems to me also probable that he was not fully apprised of the implication of such instrument. The indenture of mortgage is one covering and affecting the

whole of the land and premises, but under Clause 2.4 of the agreement he was obliged to execute a "loan mortgage" with respect to the premises nos. 25, 27 and 29, Haji Lane. There is no reason why he should encumber his own interest in the land and premises to secure the defendants' indebtedness. There was really insufficient evidence before me to find that the plaintiff had unequivocally represented to the defendants that he would not insist on his strict legal right under Clause 2.3 of the agreement. The defendants therefore have not fulfilled the first requirement.

In the circumstances, the second criterion does not arise. At any rate, the defendants have not shown that they have acted on or have been influenced by any representation made by the plaintiff. There was no evidence at all in support. Nor was there sufficient facts from which I could reasonably infer that the defendants had relied on any representation made by the plaintiff. In conclusion, I found that the defendants have not satisfied the two criteria, and their plea of equitable estoppel failed.

On both the issues, I found in favour of the plaintiff. Accordingly, I allowed the claim of the plaintiff and made the necessary consequential orders.

Also found at [1991] 3 CLJ 2324